INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Argument:	8
I. The state decisional law governing contracts of joint venture involves no Federal question and no Federal question with respect thereto was properly raised below	9
(1) The state decisional law of contracts relating to matters of joint venture involves no Federal question	9
(2) Due process does not include a guarantee of freedom from error in determination of state court litigation	9
(3) The asserted Federal question was not raised in or considered by the courts below	10
II. The findings of the court as to the terms of the contract and the fact of non-performance by petitioner are amply supported by evidence and involve no violation of the due process clause	11
(1) The finding that the contract included the requirement of performance of one-half the work by each party was amply supported by evidence	11
(2) The finding that petitioner failed to perform the work required of him under the agreement is based on ample evidence	13
Conclusion	14

CITATIONS

Cases: Page

Ajax Distributors v. *Springer*, 22 A. 2d 838 (Del. Ch.) 10
American Ry. Express v. *Kentucky*, 273 U. S. 269 10
Arrowsmith v. *Harmoning*, 118 U. S. 194 10
Bell Tel. Co. v. *Utilities Comm'n.*, 309 U. S. 30 14
Bonner v. *Gorman*, 213 U. S. 86 10
Bowe v. *Scott*, 233 U. S. 658 11
Brinkerhoff-Faris Co. v. *Hill*, 281 U. S. 673 10
Central Land Co. v. *Laidley*, 159 U. S. 103 10
Chandler v. *Manifold*, 290 U. S. 665 11
Dobry v. *Iowa*, 293 U. S. 519 11
Dorrance v. *Pennsylvania*, 287 U. S. 660 11
Erie R. R. Co. v. *Tompkins*, 304 U. S. 64 9
Gibbs v. *Zimmerman*, 290 U. S. 326 11
Hiawassee Power Co. v. *Carolina-Tenn. Co.*, 252 U. S. 341 11
McDonald v. *Oregon Navigation Co.*, 233 U. S. 665 14
New Orleans Waterworks Co. v. *Louisiana*, 185 U. S. 336 10
Overfield v. *Pennroad Corp.*, 42 F. Supp. 586; 48 F. Supp. 1008 aff'd 146 F. 2d 889 6
Perrine v. *Pennroad Corp.*, 43 A. 2d 721; 47 A. 2d 479 6
Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202 9
Tracy v. *Ginzberg*, 205 U. S. 170 10
Worcester County Co. v. *Riley*, 302 U. S. 292 10

Constitution and Rules:

Constitution of the State of Delaware, Art. I, Sec. 7 .. 10
Supreme Court of Delaware, Rules 9, 10 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 616

FRANK M. SWACKER,

Petitioner,

vs.

THE PENNROAD CORPORATION AND DANIEL O. HASTINGS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR RESPONDENT DANIEL O. HASTINGS IN OPPOSITION

Opinions Below

The opinion of the Court of Chancery of the State of Delaware, in and for New Castle County (R. 394-412) is reported in 51 A. 2d 327, 336-343. The opinion of the Supreme Court of the State of Delaware (R. 990) is reported in 57 A. 2d 63.

Jurisdiction

The judgment of the court below sought to be reviewed was entered on December 19, 1947 (R. 1002). Petition for a writ of certiorari was filed February 21, 1948. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Whether alleged errors of law by the Supreme Court of Delaware, in holding an alleged fee agreement of petitioner with respondent to have terminated for failure of consideration and in affirming the order of the Court of Chancery for allowance of fees to petitioner only on a *quantum meruit* basis, constitute a deprivation of petitioner's property without due process of law in violation of the Fourteenth Amendment.

The alleged errors are:

1. Refusal of the court to recognize that "there is inherent in a joint venture by attorneys a fiduciary relation that precludes one of them from dealing for his own account to exclusion of his associate with the subject matter of the joint venture."

2. Finding by the court, allegedly without any evidence to support it, that one of the conditions of the agreement for equal division of fees was the practically equal division of work.

3. Finding by the court, allegedly contrary to the undisputed evidence, that petitioner failed to perform the work required of him under the contract.

Statute Involved

There is involved no statute or other legislative action of the state or any subdivision thereof.

Statement

This is a proceeding by petitioner to obtain allowance of fees for his services in a stockholders' derivative action on behalf of The Pennroad Corporation which finally terminated in the payment of $15,000,000 to that corporation by the Pennsylvania Railroad (R. 1). Petitioner in his petition in the Court of Chancery, filed March 19, 1945, asserted a half interest in such fees as might be allowed to respondent Daniel O. Hastings by virtue of an oral agreement entered into by the parties in January, 1937; and at the hearing he also relied on a *quantum meruit* theory in the alternative.[1] Respondent Hastings answered alleging the contract had long been terminated by reason of petitioner's discharge by his clients in 1938 but suggested that Swacker be paid the value of his services on the *quantum meruit* (R. 7, 11).

The trial court, after hearing and on February 17, 1947, filed its opinion (R. 394; 51 A. 2d 327) holding that an essential term of the oral agreement was that each party would render substantial and continuous contributions to the prosecution of the case covered by it (R. 405). It further found that as a result of petitioner's discharge from the case by his clients there was a failure of consideration because full performance was a condition precedent (R. 410, 417). It concluded that the petitioner was entitled to a fee of $300,000 representing the fair value of his services (R. 411-412). Accordingly it entered its decree: (1) denying the prayer for joint allowance of fee to petitioner and respondent and denying the prayer for award of one-half thereof to petitioner, and (2) authorizing payment to petitioner of a free of $300,000 (R. 413, 414).

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[1] Contrary to petitioner's assertion (Pet. 3), the petition in the Court of Chancery makes no slightest mention of a Federal right nor does it otherwise raise a Federal question.

On appeal, the Supreme Court of Delaware, after argument, filed its opinion incorporating substantially the same conclusions (R. 996, 999) and entered its judgment of affirmance (R. 1002).

So far as appears necessary for the purposes of this petition, the pertinent facts may be briefly stated as follows:

The evidence showed that petitioner, an attorney, was retained in 1930 on a contingent fee basis by one Guiterman, a stockholder in The Pennroad Corporation, a Delaware corporation, to bring a stockholders' derivative suit on behalf of that corporation and in the name of stockholder relatives of Guiterman (the Perrines) against the Pennsylvania Railroad (R. 58-59, 868, 869, 929). On October 18, 1932 in the Court of Chancery of the State of Delaware with Richards, Layton & Finger of Wilmington as co-counsel (R. 65, 81) he filed a suit entitled *Perrine et al.* v. *The Pennroad Corporation, etc. et al.* (R. 80-81, 397). In June, 1936, Richards, Layton & Finger, withdrew due to conflict of interest (R. 96, 398).

After this withdrawal, petitioner engaged the respondent Hastings who initially agreed merely to be local counsel of record with a one-third participation in the fee (R. 97, 398). This agreement, however, was supplanted in January, 1937 by a new oral agreement for equal participation in the fee by Swacker and respondent Hastings in consideration of the latters' taking an "active part" in the litigation (R. 884).

In a conference in January, 1937, Swacker and Hastings orally agreed that the fees contingent upon success in the pending litigation should be divided equally between them after payment of five to ten per cent to the estate of J. Markham Marshall, a participating lawyer who had died in 1936 (R. 399; Pet. 8). As to division of work, Hastings testified that it was generally understood among them "that we would divide the work practically equally" (R. 289).

Swacker admitted on cross-examination that "it was an implied condition," of the agreement that he should participate as trial counsel and in the briefs and argument on appeal if there should be trial and appeal in the *Perrine* case (R. 231-232).

Swacker was discharged by his clients on March 18, 1938 (R. 904-907). Swacker gave his consent that both Hastings and O'Donnell [2] go ahead with the litigation without him (R. 228, 294, 299, 360) saying that he would recover from Guiterman (R. 294).[3] Swacker admitted that he surely expected to do "his share of the work" and that after his discharge he did not do that and therefore thought the contract should be modified in Hastings' favor (R. 236, 249, 250). Elsewhere in the testimony Swacker agreed that he should have less compensation because of his inactivity after he was discharged as counsel (R. 165, 166, 369, 370, 928, 933). Swacker testified that he attempted to negotiate a contract with Hastings whereby he would get less than under the fifty-fifty agreement which he now claims continued in effect (R. 237, 238). The record indicates that Swacker realized that his fifty-fifty contract had terminated also because in 1941 he insisted upon having "some agreement" and "a definite agreement" with Hastings (R. 938, 946).

Guiterman indicated he wanted Hastings and O'Donnell to continue in the case (R. 112). Thereafter Guiterman also retained Robert E. Lee Marshall of Baltimore whose advice resulted in formation of a stockholders' committee (R. 307-309) and in his bringing of the *Overfield* suit in the

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[2] Hugh O'Donnell first worked on the case as an employee of Swacker (R. 69-70) but in 1935 he began practice on his own account continuing in the *Perrine* case under agreement with Swacker for contingent compensation from Swacker's share at $100 per day but not more than 10% of the whole fee allowed counsel (R. 348-9, 994).

[3] He did in fact bring suit against Guiterman for $300,000 (R. 18, 19) in the New York courts where it is still pending.

Federal District Court for the Eastern District of Pennsylvania against Pennroad *et al.* (R. 310-312).

In May of 1940, Hastings and Max Swiren of Chicago in the same Federal court brought another suit against Pennsylvania Railroad, *et al.* acting on behalf of one Weigle (R. 298).[4] After initial proceedings establishing jurisdiction, Marshall invited Hastings to participate (R. 313-314). Thereupon, the *Overfield* and *Weigle* cases were consolidated for trial and after a trial lasting more than 70 days (R. 380) with Hastings as chief counsel and so recognized by that court (R. 995) and with Swacker not participating (R. 236), judgment for $22,104,515.92 was obtained (42 F. Supp. 586; 48 F. Supp. 1008); but this was reversed by the Circuit Court of Appeals for the Third Circuit on the ground suit was barred by the statute of limitations. *Overfield* v. *Pennroad Corporation,* 146 F. 2d 889 (Biggs, J., dissenting). Within the time for filing petition for rehearing as extended by that court, and in the light of a contemplated petition for certiorari, negotiations by Hastings and Pennroad for settlement resulted in an agreement by the Pennsylvania Railroad Company for payment of $15,000,000 to The Pennroad Corporation, $3,000,000 to be set aside as the maximum amount applicable to payment of attorneys fees and expenses in the litigation. This agreement constituted settlement of all causes of action pleaded in the *Overfield, Weigle* & *Perrine* complaints. Upon the petition for approval filed by Pennroad in the *Perrine* case, it was approved by the Delaware courts. *Perrine* v. *Pennroad Corporation,* 43 A. 2d 721; 47 A. 2d 479, cert. denied 329 U. S. 808. Thereupon the three suits were dismissed.

Promptly after the filing of the Pennroad petition for approval, Swacker in that proceeding filed his petition here

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[4] At this stage O'Donnell and Hastings represented the Perrines in Delaware; O'Donnell and Marshall represented Overfield, and Hastings and Swiren represented Weigle (R. 298).

involved requesting the Chancery Court of Delaware to retain jurisdiction over the settlement fund and to make an allowance to Swacker and Hastings and an award to Swacker of one-half of the allowance to both of them (R. 1-4).

After answer by Hastings (R. 7) and hearing (R. 33) the Court of Chancery filed its opinion February 17, 1947 (R. 394-412). It held that the oral fee agreement of the parties included an understanding that each party thereto "would, throughout its existence, render substantial and continuous contributions to the prosecution of the case" (R. 405). It also found that after March, 1938, Swacker had failed to perform the services so required of him and that there was a resultant failure of consideration (R. 406-407) barring recovery under the agreement (R. 410). However, it did award him $300,000 on his alternative *quantum meruit* theory (R. 410-412).[5]

The Supreme Court of Delaware, in affirming, took substantially the same view as the trial court, holding, however, that the agreement meant that Hastings and Swacker "would divide the work practically equally" (R. 997), and that Swacker's failure to take part after his discharge resulted in termination of the contract with Hastings (R. 997).[6] Accordingly that court entered the judgment here sought to be reviewed (R. 1002).

Argument

The most cursory examination of the record in this case discloses that the federal questions here relied upon to

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[5] Thereafter, under an arbitration agreement dated March 2, 1945, between The Pennroad Corporation, and the attorneys in the *Overfield* and *Weigle* cases (R. 28), a report of the arbitrator, Judge Welch, was submitted May 5, 1947, making an award of fees to such attorneys and certain committees (R. 985).

[6] Neither State court found it necessary to pass upon the defense of abandonment which the respondent, relying on substantially the same evidence, asserted in both courts.

sustain this Court's jurisdiction under section 237(b) of the Judicial Code are so unsubstantial as to render the petition plainly frivolous. None of the authorities cited by petitioners, even remotely sustain jurisdiction.

Under "Question Presented" (Pet. 2) and the specification of errors (Pet. 4) petitioner apparently attempts to state three Federal questions:

(1) Whether refusal of the Delaware Supreme Court to follow "the rule of law applicable to", or "the fundamental doctrine as to the fiduciary relationship inherent in a joint venture" is a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States" (Pet. 2). The specifications of error, Nos. 1-4 (Pet. 4) apparently pertain to this point.

(2) Whether the finding—allegedly wholly without evidence—that the contract included as a condition the requirement that petitioner perform one-half of the work was so arbitrary as to violate petitioner's right to due process under the Fourteenth Amendment (Pet. 2-3, 21).

(3) Whether the finding—allegedly directly contrary to the evidence—that petitioner had failed to perform the work required of him under the agreement was so arbitrary as to deprive petitioner of property without due process of law in violation of the Fourteenth Amendment (Pet. 2-3, 21).

Specifications of error, Nos. 5 and 6 (Pet. 4) pertain to the last two questions.

On their face these contentions present no substantial Federal question nor any occasion for the exercise of the jurisdiction of this Court.

I

The State Decisional Law Governing Contracts of Joint Venture Involves No Federal Question and No Federal Question With Respect Thereto Was Properly Raised Below.

Petitioner complains first of a failure of the court below "to recognize the fundamental doctrine that there is inherent in a joint venture by attorneys a fiduciary relationship that precludes one of them from dealing for his own account to the exclusion of his associate with the subject matter of the joint venture" (Pet. 2).

(1) *The state decisional law of contracts relating to matters of joint venture involves no Federal question.*—The petitioner apparently proceeds on the theory that the due process clause of the Fourteenth Amendment imposes on the state court a duty to follow a sort of Federal common law of contracts. No authorities are cited for the proposition. The rule to the contrary, both in law and in equity, is established. *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 78; *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, 205.

Indeed, the petitioner recognizes the rule of the *Erie* case which defeats his contention, whether this be regarded as a question of ordinary contract law or of specialized joint-venture contract law. He states that the decision below "establishes a rule of law that will be binding on the Federal court for the District of Delaware" (Pet. 4, 24). In the application of this rule no distinction is suggested as between trial and appellate Federal courts and of necessity there can be none.

(2) *Due process does not include a guarantee of freedom from error in determination of state court litigation.*—At most, petitioner's argument as to the incidents of the contract is merely a contention that the state court's decision was wrong. It is not contended that there was any lack of procedural due process. It has long been uniformly ruled

that the Fourteenth Amendment of the Constitution of the United States creates no right in litigants to, nor correlative duty on the part of the state courts to make, decisions free from error in matters involving no Federal question because purely of state cognizance. *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 196; *Central Land Company* v. *Laidley*, 159 U. S. 103, 112; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 344, 351-352; *Tracy* v. *Ginzberg*, 205 U. S. 170, 177-178; *Bonner* v. *Gorman*, 213 U. S. 86, 91; *American Ry. Express* v. *Kentucky*, 273 U. S. 269, 273; *Worcester County Co.* v. *Riley*, 302 U. S. 292, 299; see *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 680.

(3) *The asserted Federal question was not raised in or considered by the courts below.*—Contrary to petitioner's assertion (Pet. 3) no Federal right was asserted or even remotely suggested as being involved in his petition in the trial court (R. 1-4).

The opinion of the Supreme Court of Delaware contains not the slightest reference to any Federal question (R. 990-1001). Petitioner's assignment of errors with respect to the refusal of the trial court to apply his concept of the applicable principles of the law of fiduciaries was inadequate to raise any Federal question. The assignment upon which he relies on this point, Assignment 7 (Pet. 3; R. 418) merely urges that the result of the trial court's decision was "a denial of due process." Under the rules of this Court, this is deemed a reference solely to the due process provision of the State Constitution (Art. I, sec. 7; *Ajax Distributors* v. *Springer*, 22 A. 2d 838, 841 (Del. Ch.)) to which petitioner specifically refers in his assignment of error No. 6 (R. 418) and affords no basis for invoking jurisdiction of this Court. *Bowe* v. *Scott*, 233 U. S. 658, 665; *Dobry* v. *Iowa*, 293 U. S. 519; see *Gibbs* v. *Zimmerman*, 290 U. S. 326, 328. Errors not set out in the assignment of errors will not be considered by the Supreme Court of Delaware

(Rules 9, 10) or by this Court. *Hiawassee Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. 341, 343-344; *Chandler* v. *Manifold*, 290 U. S. 665-666; *Dorrance* v. *Pennsylvania*, 287 U. S. 660-661.

It is plain, therefore, that this alleged Federal question was neither raised in, nor considered by the Supreme Court of Delaware. The asserted right under the Federal Constitution was plainly not "specially set up or claimed" so as to vest this Court with jurisdiction within the meaning of Section 237 (b) of the Judicial Code.

II

The Findings of the Court as to the Terms of the Contract and the Fact of Non-Performance by Petitioner Are Amply Supported by Evidence and Involve No Obligation of the Due Process Clause

The contention of petitioner based on the lack of evidence to support the findings as to (1) the terms of the contract and (2) the lack of performance by petitioner may be considered together. Petitioner has cited no case holding that the making of findings without evidence or contrary to the undisputed evidence constitutes a judicial denial of due process. However, even if it be assumed, *arguendo*, that decision based upon findings so made would be so arbitrary as to infringe a party's rights under the Fourteenth Amendment, it is manifest that there was no such infringement here.

(1) *The finding that the contract included the requirement of performance of one-half the work by each party was amply supported by evidence.*—As to division of work under the agreement, Hastings testified that it was generally understood among them "that we would divide the work practically equally" (R. 289). Swacker denied this and asserted that the agreement was that each should "do what might most naturally fall to us to do" (R. 231).

He admitted on cross-examination, however, that it was an implicit condition of the agreement that he should participate as trial counsel and in the briefs and argument on appeal if there should be trial and appeal (R. 231-232).

The trial court found the activities of the parties between January, 1937 and March, 1938, before any disagreement arose, indicative of the meaning of the agreement (R. 403, 404). During this period Swacker was doing and causing O'Donnell to do substantial work and Hastings, while doing substantial legal research and pursuing evidence, also relied heavily on Swacker (R. 404). Swacker admitted that he surely expected to do "his share of the work" and that he did not do that and therefore after his discharge thought the contract should be modified in Hastings' favor (R. 249, 250). Elsewhere in the testimony Swacker agreed that he should have less compensation because of his inactivity after he was discharged as counsel (R. 165, 166, 369, 370, 928, 933). After Swacker was discharged and O'Donnell told him of a contemplated agreement between participating counsel reserving a maximum of 18% for Swacker, he said he would not accept that, but did not assert a continuing right to 50% (R. 363). Swacker testified that he attempted to negotiate a contract with Hastings whereby he would get less than the 50% which he now claims (R. 237, 238).

The record indicates that Swacker realized that the original contract required substantially equal work and that he had not so performed, and, indeed, indicates abandonment thereof. For in 1941 he insisted upon having "some agreement" and "a definite agreement" with Hastings (R. 937, 938, 946).

It was upon consideration of all this evidence that the trial court reached its finding that the oral agreement contained as one of its essential terms the requirement that each party should "throughout its existence render substantial and continuous contributions to the prosecution of

the case" (R. 404-405). And on the same evidence the Supreme Court of Delaware concluded that the agreement "meant that they would divide the work equally" (R. 997).

Plainly the record does not support petitioner's contention that there was no evidence to support the finding of the courts below as to his duty under the agreement.

(2) *The finding that petitioner failed to perform the work required of him under the agreement is based on ample evidence.*—Petitioner also asserts the finding of non-performance by Swacker (R. 406, 995, 996) upon which the courts below concluded that there was a failure of consideration (R. 406, 998) was contrary to the undisputed evidence (Pet. 4-5, 21).

Contrary to petitioner's premise, the evidence amply supports this finding in which the two State courts concurred:

Swacker himself testified that he didn't do his share of the work under the fifty-fifty agreement (R. 249, 236) and that that was why he and Hastings should have a readjustment (R. 249). His only visit to Philadelphia during the trial was to seek a new fee contract with Hastings (R. 237) by which he would get less (R. 238). Immediately after his discharge, according to his own memorandum sent to Hastings (R. 928-929), he explained to O'Donnell that he had withdrawn from active participation (R. 933) and was willing to make some arrangement with Hastings on division to take cognizance of his lesser activity (R. 238-239, 933). He asked O'Donnell to get a definite new arrangement with Hastings, suggesting either 23½% or 33½% (R. 369, 370). He testified that he considered that "the situation called for a more equitable division and was ready and willing to make one" (R. 237). His work was of very slight help (R. 302, 383, 384).

Manifestly, the finding of non-performance in which both

of the courts below concurred was amply sustained by evidence and involved merely the simple determination of credibility and weight of the evidence.

Petitioner's contention is based on the premise that there was no evidence to support the findings in which the two lower courts concurred. Since the record clearly shows that there was substantial evidence in support of these findings, there is no basis for his contention.

In any event where, after appropriate hearings a State court determines that there is evidence to support a finding, its misconception or wrong interpretation of the evidence as to matters involving no Federal question because purely of State cognizance is mere error of law, uncontrolled by the due process clause of the Fourteenth Amendment and presents no substantial Federal question. *McDonald* v. *Oregon Navigation Co.*, 233 U. S. 665, 669-670; *Bell Tel. Co.* v. *Utilities Comm.* 309 U. S. 30, 32.

Conclusion

No substantial Federal question is indicated in the pleadings, the record, the errors argued, the briefs of counsel, the opinions of the trial court or the opinions of the Supreme Court of Delaware. No substantial Federal question was presented to either the lower court or the Supreme Court of Delaware and no Federal question was decided by the trial court or the Supreme Court of Delaware or was necessary to a decision of the cause. The petition presents no substantial Federal question for review and should be denied.

Respectfully submitted,

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March 1948.